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NO. 83-1297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner

v.

R. BRUCE RIPLEY, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER, THE RETURN PREPARERS, TAX CONSULTANTS, ATTORNEYS, AND/OR ACCOUNTANTS SHOULD BE PROSECUTED BY THE GOVERNMENT IN THE ABSENCE OF "FAIR NOTICE" PROVIDED BY PRIOR STATUTE, REGULATION, OR COURT DECISION?

2. WHETHER THE GOVERNMENT PROVED, BEYOND A REASONABLE DOUBT, THAT R. BRUCE RIPLEY'S ADVOCACY OF IDEAS WAS THE PROXIMATE CAUSE OF THE PRESENTATION AND THE FILING OF ALLEGEDLY FALSE AND FRAUDULENT INCOME TAX RETURNS?

PARTIES TO THIS PROCEEDING

In addition to the parties shown in the caption of this case, Karl L. Dahlstrom, David J. Morris, and Gaze Durst were Appellants below and are Respondents herein.

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Karl L. Dahlstrom, et al., v. United States*, 713 F.2d 1423 (August 24, 1983). The Judgment of the United States District Court for the Western District of Washington has not been reported.

JURISDICTION

As stated above the Judgment of the Court of Appeals was entered on August 24, 1983. A Petition for Rehearing, filed by the United States, was denied on November 8, 1983. On December 30, 1983, Mr. Justice Rehnquist extended the time in which to file a Petition for Writ of Certiorari by the Government to and including February 6, 1984. Thereafter, by Application of David Bottsford, the time within which all Respondents could respond to the Petition of the United States was extended to April 11th, 1984. The jurisdiction of this Court has been invoked pursuant to Title 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Section 7206(2) of the Internal Revenue Code of 1954 (26 U.S.C.) provides:

Section 7206. Fraud and False Statements

> Any person who willfully aids or assists in, or procures, counsels or advises the preparation of presentation under, or in any connection with any matter arising under, the Internal Revenue Laws of a return, Affidavit, Claim or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, Affidavit, Claim or document;
>
> Shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000.00 or imprisoned not more than three (3) years, or both, together with costs of prosecution.

STATEMENT OF THE CASE

Respondent, R. Bruce Ripley, was one of the Defendants in a "test case" brought by the Tax Division of the United States Department of Justice in the United States District Court for the Western District of Washington, Seattle Division. He was charged, along with four other Defendants, with conspiracy to defraud the United States in violation of Title 18 U.S.C. Section 371. Ripley was convicted on Counts 1, 3, and 5 of the Indictment, but was acquitted on all other Counts, of fact pointedly ignored in the Government's Statement.

The Government's analysis of the evidence, in its "Statement" is highly inflammatory, self-serving and not supported by the record. Earlier on in its diatribe the Government attempts to besmirch the American Law Association as " . . . nominally a membership organization, it was controlled by Dahlstrom . . .". (Pet. for Writ, Page 3, Note 3) The record in this case refutes this attack for this Court has defined an association as follows:

> "An association is said to be *any* group of persons whether temporarily or permanently associated together, for joint action or advancement of views on any subject.". *Sweezy v. New Hampshire*, 354 U.S. 231 (1957).

After this proverbial "stubbing of the executive toe" the Government then recounts, in checkered fashion, its own version of the evidence which bears little, if any, connection with the alleged deeds or misdeeds of Respondent Ripley. While the Government recounts, in minute detail, the advice, counseling, and activities of the first Respondent Dahlstrom, and then, Respondent Morris, Respondent Ripley is directly accused of the following:

1. Advocating the use of blue "copy-not" pens to "tax shelter" purchasers so that their checks could not be microfilmed by their banks.

2. Giving seminars, as Vice President of the American Law Association, where various benefits enuring to membership in the association were discussed.

Completely absent from the Government's version of the facts was any reference to specific advice, attributable to Appellant Ripley, which was acted upon and resulted in fraudulent overstating of deductions on any purchasers' or members' income tax return.

In fact, a fair reading of the record belies the Government's claim concerning the blue pens. One of the Government's witnesses, Clyde Eastwood, indicated the matter of the blue pens was not raised by Ripley during his seminar but, instead, was mentioned by a member of his audience who had seen the Sixty Minutes Program "None of Your Damn Business". (Tr. 1591). Dr. Kuhns, another Government witness, indicated that the pens were mentioned in passing and were " . . . not something that we had to use . . .". (Tr. 1812). The consistent theme of these Government witnesses was borne out by Dr. Austin, who also indicated that the use of the pens was not a mandatory requirement advocated by Ripley's seminar. (Tr. 1739). Another Government witness who supposedly received such advice from Ripley, Dr. James Howlett, could not even identify the Respondent. (Tr. 1842).

Reference to John Wilbur Ricketts, and the advice he received from Respondent Durst, is particularly inappropriate in reviewing the sufficiency of the evidence as to

Ripley's conviction since Ripley was acquitted on the substantive Count pertaining to him. (Pet. for Writ, Page 7).

Also noticeably lacking in the Government factual review was any citation to the transcript of testimony, Exhibits, or record below, which would establish Respondent Durst's membership in the A.L.A. In reality, Durst was an independent accountant, was not a member of the A.L.A., had no connection whatever with Respondent Ripley, or his seminars, and could make no statements binding on Ripley's interest.

The controls on the membership, calculated to insure associational privacy, was not promulgated or implemented by Respondent Ripley.

All of these associational activities were specifically noted as legal by the Court of Appeals in its Opinion, a fact not challenged here. This concentration on legal activity by the A.L.A. and Respondent Ripley, in particular, is particularly disturbing, especially so in light of the complete absence of concrete evidence linking Ripley's "advocacy of ideas" to the preparation and/or filing of a false or fraudulent return containing overstated deductions.

The Government grossly misstates and unfairly maligns the holding of the Court of Appeals in reversing the convictions. The Government's comment "the Court did not question the sufficiency of the evidence that the Respondent had aided or assisted in the preparation of false and fraudulent tax returns" is nothing more than self-serving fantasy, as is its assertion that the Court did not " . . . question the adequacy of the evidence that

Respondents actually believed that their scheme was false and fraudulent . . .". (Pet. for Writ, Page 8). A fair reading of the Opinion of the Court of Appeals establishes that the majority viewed the Government's evidence as deficient in both categories. The prosecution did not prove that Ripley had "fair notice" that the deductions advocated by the A.L.A. *were inherently illegal.* In fact, the Government never proved that they were, even in his criminal case. Without notice of the *inherent illegality* of the deductions advocated in the seminar program, formulated by Respondent Dahlstrom, Ripley did not have the requisite intent to violate the substantive Statute and the Government's evidence was insufficient to prove guilt beyond a reasonable doubt.

The record below is rife with testimony, from the Government's own witnesses, that Respondent Ripley believed in the legality of the deductions and tax planning advocated. The Government, simply put, was unable to prove prior receipt of "fair notice" by the Respondent. The Government's citation[1] of cases purportedly concerning "similar schemes" merely underscores the fundamental unfairness of this ill-conceived prosecution.

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1. The Government cites *U.S. v. Landsberger*, 692 F.2d 501 (C.A. 8, 1982); and *Zmuda v. Commissioner*, 79 T.C. 714 (1982), Appeal pending, No. 83-7374 (C.A. 9 1983) as "subsequent" authority invalidating the use of foreign trusts to reduce domestic taxes. In *Landsberger* the purported promoter was sued for preliminary and Permanent Injunction to prevent "recurring violations". In *Zmuda* the issue of "economic substance" as it related to the economic dealings between various trust entities was examined by the Tax Court and resolved against the taxpayer. The Court of Appeals expressly noted that the Government's reliance on *Zmuda*, for provision of fair notice to the Respondents was misplaced since *Zmuda* was rendered subsequent to the events and activity complained of in the Government's Indictment. Neither *Landsberger* nor *Zmuda* was a criminal case.

REASONS FOR DENYING THE PETITION

1. **WHETHER THE RETURN PREPARERS, TAX CONSULTANTS, ATTORNEYS, AND/OR ACCOUNTANTS SHOULD BE PROSECUTED BY THE GOVERNMENT IN THE ABSENCE OF "FAIR NOTICE" PROVIDED BY PRIOR STATUTE, REGULATION, OR COURT DECISION.**

2. **WHETHER THE GOVERNMENT PROVED, BEYOND A REASONABLE DOUBT, THAT R. BRUCE RIPLEY'S ADVOCACY OF IDEAS WAS THE PROXIMATE CAUSE OF THE PRESENTATION AND THE FILING OF ALLEGEDLY FALSE AND FRAUDULENT INCOME TAX RETURNS.**

The Government begins its legal argument with a desperate human cry. Its ability to enforce the tax laws effectively has been mortally wounded by the slings and arrows of outrageous due process. The mighty engine of executive and administrative tax collection has somehow mired in the—incomprehensible to it—quagmire of the First Amendment.

The Government, in its Petition for Writ, likens the Respondents to jazz musicians who, apparently, are to be jailed for their "artistic unwarranted exercise of artistic license". Far from presenting the subject, in a serious vein, the Government likens the studied efforts of this nation's tax advisory and tax consultant industries to the "artistry of tax evasion".

Respondent Ripley suggests that such frivolity is not only out of place but demonstrative of a studied and

growing Government contempt for the tax planning industry itself.

The Government's inexorable and continuing assault on the fundamental values of due process, and the First Amendment, far from being a humorous diversion, instead constitutes a serious Constitutional malignancy which "sounds a sour note" in the necessary counterpoint between a sometimes over-zealous Revenue and the well-informed citizenry.

Respondent Ripley also rejects the Government's statement that its evidence established the patent illegality of his alleged "tax shelter" program or that he ". . . knew and understood that it was illegal . . .". There is simply no evidence linking Respondent Ripley with "fictitious names for authorized signatures on bank accounts . . ." or ". . . false social security numbers . . .". As for the reluctance to show books and records attributed to Ripley, the Government's own witness, Dr. Austin, indicated that he was instructed to turn over his books and records if the Internal Revenue Service obeyed the law in seeking their production. (Tr. 1746).

The discussion contained on Page 10 of the Government's Petition for Writ should be disturbing to any fair minded jurist. After initially insulting both the intelligence and integrity of the panel of the Ninth Circuit rendering the Opinion below, the Government scrivener then goes on to state:

> "According to the Court, it does not matter whether the Defendant has manifested an intent to assist in defrauding the Government; the absence of a prior statute, regulation, or Court decision in point precludes criminal prosecution. The Court thus effec-

> tively removed the threat of criminal liability from any tax evasion counselor creative enough to devise an as-yet-unchallenged variety of tax fraud.".

A clear reading of the Opinion of the Court of Appeals does not reveal such a result. Obviously, a so-called "variety of tax fraud" could be unchallenged and yet be subject to "clearly relevant precedent" which would provide "fair notice". To argue otherwise would be to ignore the Government's self-conflicting argument that prior civil tax cases are to be relied upon in determining whether prior "fair notice" has actually been given.

The Government cites a series of cases to support its contention that ". . . the Courts have frequently sustained criminal tax prosecutions based on the general concept of sham transactions, provided there is evidence of actual fraudulent intent . . .". Citing *U.S. v. Baskes,* 687 F.2d 165 (7th Cir. 1981); *U.S. v. Conforte,* 624 F.2d 869 (9th Cir.), cert. denied, 449 U.S. 1012 (1980); *U.S. v. Turkish,* 623 F.2d 769 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *U.S. v. Clardy,* 612 F.2d 1139 (9th Cir. 1980); *U.S. v. Freuhauf Corp.,* 577 F.2d 1038 (6th Cir.), cert. denied, 439 U.S. 953 (1978); *U.S. v. Raub,* 177 F.2d 312 (7th Cir. 1949).

None of the above cases, after close examination, conflict with the decision of the Court of Appeals below. *Baskes,* far from involving unique and "highly debatable" issues of tax law concerning foreign trusts, instead addressed the well settled principles endemic to fraudulent commodity straddles. Furthermore, *Baskes* actually reviewed the fraudulent returns itself claiming the bogus deductions, before it was filed. (*Baskes* at Page 170).

The participation of Baskes in the commodity straddle scheme went far beyond mere "advocacy of ideas" and constituted "direct participation". Likewise, there was direct evidence that Baskes himself (who was charged as a conspirator) knew of the underlying illegality of the straddle deductions. (*Baskes* at Page 168 and 169). In *Conforte* the panel of the Ninth Circuit, unlike here, disclaimed any ". . . complexities of the necessity of defined distinctions . . .", in reviewing the convictions. The Court of Appeals in *Conforte*, found nothing complex about the law of federal income tax requirements relating to employers. (See *Conforte* at Page 875). *Turkish* was another case involving the well-settled principles pertaining to fraudulent commodity straddles. The panel of the Court of Appeals for the Second Circuit specifically found ". . . fraudulent manipulations of prices in a commodity market . . ." in sustaining the conviction. (See *Turkish* at Page 771). *Clardy* involved already well-settled tax law principles pertaining to deduction of prepaid interest expense. Unfortunately for the Appellant in *Clardy*, the Government could prove that the prepaid interest deducted had never actually been paid. The Court of Appeals, in *Clardy* distinguished its decision from *U.S. v. Kritzer*, 498 F.2d 1160 (4th Cir. 1974) on the basis of the facts before it. As noted by the Court:

> "Counsel for *Clardy* stressed that this is a criminal prosecution rather than a civil action respecting taxes; then they argued that whether interest is paid as a tax issue not free from doubt, that there is room for honest disagreement, and that the conviction cannot be sustained because of belief that the deductions were proper was one which an informed person could hold in good faith.".

The issue of interest payment is not "highly debatable". It is simply: was the interest paid or not? See *Clardy* at Page 1152. *Freuhauf* involved understatement of an "excise tax base" which resulted in understatement of federal excise tax liability. By *Clardy* the panel of the 6th Circuit in *Freuhauf* disclaimed the presence of any novel or unique issues of tax law in affirming the convictions. There were several objectionable "schemes" in *Freuhauf*. In sustaining the convictions the Court of Appeals noted that *Freuhauf* had not refrained from its practice of excluding certain add-on charges from "the sale price upon which the tax is based . . ." even after promulgation of a specific treasury regulation governing the point. (Treasury Regulation 330.1-1[b]). Another "scheme" involved deliberate overstatement of tire purchase prices, with the attendant overstatement of tax credit resulting from the purchase. The Court of Appeals, in *Freuhauf* specifically noted that the Appellant had violated regulations directly pertinent to the considerations of "fair notice" during at least a portion of the period encompassed by the alleged conspiracy. (See *Freuhauf* at Pages 1061 and 1062). Besides the absence of such regulations here, *Freuhauf* is also distinguishable in that the District Judge entering the convictions apparently acquitted *Freuhauf* on the only charge of the Indictment where the law was found to be unclear or questionable. (*Freuhauf* at Page 1066 and 1067). In *Raub*, where a fraudulent scheme to obscure corporate profits, through real estate purchases, was unveiled, the Court of Appeals expressly noted that no funds had changed hands which could be said to have lent economic substance to the sales of trucks and tractors in subsequent purchases of real estate, between the agent and her prin-

cipals, so as to allow Appellants in that case a good faith argument that they believed the validity of the underlying deductions claimed. Also, the convicted Appellant in *Raub* had failed to make full disclosure to his tax consultant and attorney, a fact which the Court of Appeals found to be clear evidence of his intent to deceive and defraud. (See *Raub* at Page 314).

The Government admits that the uncertainty of the law may negate the specific intent inherent in willfullness. After paying lip service to this "horn-book" principle Petitioner then attempts to thwart its application to Respondent's case. *United States v. Moss,* (C.A. 8, 1979), cert. denied, 444 U.S. 1071 (1980), and *United States v. Buttorff,* 572 F.2d 619 (8th Cir.), cert. denied, 437 U.S. 906 (1978). The Court of Appeals, in *Buttorff,* specifically noted that the speech of the Defendant in that case did not result in "imminent" criminal conduct on the part of his audience, and was troubled by that fact. In any event, the advice espoused by Buttorff and Moss to their respective audiences, if followed, could have resulted in nothing *other* than criminal conduct. Such advice had no legal application. Thus, the instant case is readily distinguishable from those two decisions.

The Government admits that a speaker ". . . can not be held responsible for the remote consequences of his speech . . .". (See Petition for Writ, Page 25.) Although the Government notes that the *Brandenberg Rule* has recently been restated by this Court in *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982), the Government attempts to grossly distort the holding in that case. And, while noting that "the Federal Statutes directed at promoters of abusive tax shelters are predicated on the

congressional judgment that the professional advisor or salesman of a tax shelter is generally more culpable than the purchaser who may have relief on the representations as to the tax consequences of the investment.", the Government fails to point out that all new tax enforcement remedies provided to the Government under T.E.F.R.A. are civil, rather than criminal, in nature.

The Government attempts to mislead this Court into accepting its statement that *Claiborne Hardware* established a "reasonable period" within which to hold a speaker liable for the criminal conduct resulting from his speech. Such reasonable period, the Government goes on to state, is no more than "weeks or months". The Government's argument, on Page 26 of its Petition for Writ, said "unlike the flash of violence may follow an inflammatory speech, a tax evasion scheme requires time, is a thinly-disguised appeal to this Court to change the *Brandenberg* Rule. Far from approving the Government's rationale that "imminency" under *Brandenberg* could be found weeks or months after the speech in question, this Court, reversed the Mississippi Supreme Court in *Claiborne Hardware*, partially on the basis that the Judgment against Evers could not be sustained due to "lack of imminency".

Claiborne Hardware also raises other issues blithely ignored by the Government which support the holding of the Court of Appeals below. With respect to Ripley, the Government's argument assumes the illegality of the entire "tax shelter scheme". This was neither proven below nor is it supported by this Court's rationale in *Claiborne Hardware*. The premier question in cases of this type, i.e., whether Respondent's speech was the "proximate

result" of the illegal activity of his audience is not even mentioned. As reiterated in *Claiborne Hardware*, an individual can not be penalized simply for assisting in the conduct of an otherwise lawful meeting . . .". The Government failed to establish the legal elements of the "tax shelter scheme" and to separate them, by distinct evidence, from the "advocacy" which it claims resulted in the filing of false and fraudulent income tax returns. As a result of its failure the Government doomed the convictions to reversal since "the precision of regulation" envisioned in *Claiborne Hardware* requires that the speaker be punished, if at all, only for the criminal activity which the proximate result of the speech at issue. Lacking in the evidence is any indication that Ripley "established a knowing affiliation with an organization possessing unlawful aims and goals, and had a specific intent to further those illegal aims.". As noted by this Court, "Only those losses proximately caused by unlawful conduct may be recovered.".

Certainly the free dissemination of ideas in the tax planning field is as worthy a goal as the associational speech protected by this Court in *Claiborne Hardware*. The remoteness of the criminal activity, viewed in relation to the time of advocacy, along with the opportunity of the various taxpayers to consult other sources before making the final decision to file the "objectionable" return highlights the necessity for caution and restraint. Illegal acts occurring weeks or months after speech objectionable to the Government lack the sort of connection necessary to invoke the punishments of the criminal law.

Respondent Ripley was convicted for acts of "free speech". There was no evidence of his direct participa-

tion in the formulation, presentation, or filing of any income tax returns. There was no ratification, on his part, of the statements of even his co-Respondents, and they do not reflect his expressed intent.

In *Lamar Outdoor Advertising v. Mississippi Tax Commission*, 701 F.2d 314 (5th Cir., 1983), a case heavily relied upon by the Government, the Fifth Circuit held that the speech must "actively and intentionally promote or encourage illegal activity" in order to be criminalized. Even though *Lamar* involved commercial speech, the Court sounded a cautionary note that "the First Amendment guarantee of freely-flowing channels of information would be seriously eroded if information could be deprived of constitutional protection whenever a state could conclude that some people might independently choose to act on it in an unlawful manner.". The Court of Appeals closed its decision with the conclusion that a speaker's words "should not be deprived of constitutional protection unless his words are directed toward producing the unlawful response.". *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490 (1949) does not require a contrary result. In *Giboney* the *sole immediate object* of the union picketing activitity was to effect a combination in restraint of trade, a goal repugnant under both federal and state law. The Government failed in the instant case to prove that the "sole immediate object" of the American Law Association program was illegal. Thus *Giboney* has no application here.

The Government's effort to proscribe the valid exercise of First Amendment rights, in the commercial field, is reminiscent of another attempt by it, recently frustrated, to punish the exercise of a citizen's right to redress from

its public officials under the criminal law, *United States v. Hylton,* 710 F.2d 1106 (5th Cir., 1983). The Government's efforts here should be no more seriously entertained than those in *Hylton.*

NOTICE OF ADOPTION OF AUTHORITY OF CO-RESPONDENTS

Respondent, R. Bruce Ripley, hereby adopts all of the Appellate arguments of his Co-Respondents where not inconsistent with the arguments made herein.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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